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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 243/2023 & CM APPL. 20652/2023(288 Days Delay)

PRINCIPAL COMMISSIONER OF INCOME TAX -7, DELHI
..... Appellant

Through: Mr. Sunil Agarwal, Sr. Standing Counsel with Mr. Shivansh B. Pandya, Jr. Standing Counsel, Mr. Viplav Acharya, Jr. Standing Counsel and Mr. Utkarsh Tiwari, Advocates.

versus

SUBASH DABAS & ANR. ..... Respondents

Through: Mr. Tarun Gulati, Sr. Advocate with Mr. Sumit K. Batra, Mr. Manish Khurana, Ms. Priyanka Jindal and Mr. Devansh Garg, Advocates.

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\+ ITA 245/2023 & CM APPL. 21036/2023(265 Days Delay)

PRINCIPAL COMMISSIONER OF INCOME TAX-7, DELHI
..... Appellant

Through: Mr. Sunil Agarwal, Sr. Standing Counsel with Mr. Shivansh B. Pandya, Jr. Standing Counsel, Mr. Viplav Acharya, Jr. Standing Counsel and Mr. Utkarsh Tiwari, Advocates.

versus

SUBASH DABAS ..... Respondent

Through: Mr. Tarun Gulati, Sr. Advocate with Mr. Sumit K. Batra, Mr. Manish Khurana, Ms. Priyanka Jindal and Mr. Devansh Garg, Advocates.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

% **17.05.2024**

PER: PURUSHAINDRA KUMAR KAURAV, J.

1. The instant appeals have been preferred by the Revenue, assailing two separate orders of the Income Tax Appellate Tribunal [**"ITAT"**] dated 25.11.2021, whereby, the appeal of the Revenue has been dismissed on the ground of lack of appropriate approval as per Section 153D of the Act. The appeals pertain to Assessment Years [**"AYs"**] 2009-10, 2010-11 and 2011-12. Since they raise a common issue, hence, the same are being decided by this common order. For the sake of clarity, the facts are being extracted from ITA 243/2023.

2. As per record, the assessee appears to be a Proprietor of a company namely, Tirupati Construction Company and earns business income from the said proprietorship firm. He is additionally stated to earn salary income from an entity namely, Tirupati Constwell Pvt. Ltd. The dispute involved in the present *lis* got triggered with the initiation of a search and seizure operation dated 14.09.2010 on Dabas Group under Section 132 of the Income Tax Act, 1961 [**"Act"**]. The premises of the assessee were also searched as per Section 132(1) of the Act.

3. On 18.10.2012, the case of the assessee got centralized under Section 127 of the Act and a notice dated 22.10.2012 under Section 153A of the Act was duly issued and served upon the assessee. The assessee filed his Income Tax Return [**"ITR"**] for the relevant AY, declaring a total income of Rs. 2,69,85,790/-.

4. Thereafter, the assessing officer [**“AO”**] passed an assessment order under Section 143(3)/153A of the Act, assessing the total income at Rs.19,19,39,713/-, *inter alia,* after making certain additions under Sections 68 and 69 of the Act. The AO additionally disallowed the personal expenses and initiated penalty proceedings under Section 271(1)(c) of the Act.

5. Being aggrieved by the order of the AO, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [**“CIT(A)”**], which deleted the additions made by the AO under Sections 68 and 69 of the Act and other heads which are not necessary to be discussed in detail at this juncture. However, *inter alia*, the CIT(A) sustained additions made by the AO on account of deemed dividend under Section 2(22)(e) of the Act.

6. Against the order of the CIT(A), the Revenue filed an appeal before the ITAT, which held that the assessment orders were themselves vitiated. According to the ITAT, the said orders lacked a valid approval under Section 153D of the Act and thus, no such additions could have been made against the assessee.

7. The Revenue has, therefore, proposed the following substantial questions of law for our consideration: -

> “ I. On the facts and circumstances of the case and in law, the ITAT erred in holding that the approval under Section 153D of the Act was mechanical and invalid, without even going into the merits of additions made by AO?
>
> II. On the facts and circumstances of the case and in law, ld. ITAT erred in dismissing Revenue’s appeal on a mere technical ground without deciding Revenue’s appeal on merits.”

8. Learned counsel for the Revenue submitted that there is a striking difference between the power of ‘Approval’ and ‘Appellate

power' and thus, the ITAT has erroneously held that the requisite approval has been granted in a mechanical manner. The said submission was, however, vehemently opposed by the learned counsel for the assessee who contended that the mandate of law prescribed under Section 153D of the Act must be scrupulously followed at the time of grant of approval by the concerned authority. According to him, since the approval has not been appropriately granted, the orders of the ITAT deserve to be set aside.

9. We have heard the learned counsel appearing for the parties and perused the record.

10. The brief controversy involved in the present appeals pertain to whether the competent authority has granted approval under Section 153D of the Act in an inappropriate manner, *dehors* the settled position of law?

11. Recently, in the case of **Pr. Commissioner of Income Tax -15 v. Shiv Kumar Nayyar** [ITA 285/2024], we had an occasion to deal with an almost identical issue i.e., grant of approval under Section 153D of the Act in a mechanical manner and without application of mind. The relevant discussion of the said decision in Paragraph nos. 10 to 15, is reproduced hereunder as: -

> "10. Before embarking upon the analysis of the factual scenario of the instant appeal, we deem it apposite to examine the underlyingintent of the relevant provision of the Act i.e., Section 153D, which is culled out as under:-
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> > "**153-D. Prior approval necessary for assessment in cases or requisition.—**No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (*b*) of [sub-section (1) of Section 153-A] or the assessment year referred to in clause (*b*) of sub-section (1) of Section 153-B, except with the prior approval of the Joint Commissioner :

Provided that nothing contained in this section shall apply where the assessment or reassessment order, as the case may be, is required to be passed by the Assessing Officer with the prior approval of the [Principal Commissioner or Commissioner] under sub-section (12) of Section 144-BA."

11. A plain reading of the aforesaid provision evinces an uncontrived position of law that the approval under Section 153D of the Act has to be granted for "each assessment year" referred to in clause (b) of sub-section (1) of Section 153A of the Act. It is beneficial to refer to the decision of the High Court of Judicature at Allahabad in the case of **PCIT v. Sapna Gupta** [2022 SCC OnLine All 1294] which captures with precision the scope of the concerned provision and more significantly, the import of the phrase- "each assessment year" used in the language of Section 153D of the Act. The relevant paragraphs of the said decision are reproduced as under:-

> "13. It was held therein that if an approval has been granted by the Approving Authority in a mechanical manner without application of mind then the very purpose of obtaining approval under Section 153D of the Act and mandate of the enactment by the legislature will be defeated. **For granting approval under Section 153D of the Act, the Approving Authority shall have to apply independent mind to the material on record for "each assessment year" in respect of "each assessee" separately. The words 'each assessment year' used in Section 153D and 153A have been considered to hold that effective and proper meaning has to be given so that underlying legislative intent as per scheme of assessment of Section 153A to 153D is fulfilled.** It was held that the "approval" as contemplated under 153D of the Act, requires the approving authority, i.e. Joint Commissioner to verify the issues raised by the Assessing Officer in the draft assessment order and apply his mind to ascertain as to whether the required procedure has been followed by the Assessing Officer or not in framing the assessment. The approval, thus, cannot be a mere formality and, in any case, cannot be a mechanical exercise of power.
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> ***
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> **19. The careful and conjoint reading of Section 153A(1) and Section 153D leave no room for doubt that approval with respect to "each assessment year" is to be obtained by the Assessing Officer on the draft assessment order before passing the assessment order under Section 153A."**

[Emphasis supplied]

12. It is observed that the Court in the case of Sapna Gupta (supra) refused to interdict the order of the ITAT, which had held that the

approval under Section 153D of the Act therein was granted without any independent application of mind. The Court took a view that the approving authority had wielded the power to accord approval mechanically, inasmuch as, it was humanly impossible for the said authority to have perused and appraised the records of 85 cases in a single day. It was explicitly held that the authority granting approval has to apply its mind for "each assessment year" for "each assessee" separately.

13. Reliance can also be placed upon the decision of the Orissa High Court in the case of Asst. CIT v. Serajuddin and Co. [2023 SCC OnLine Ori 992] to understand the exposition of law on the i ssue at hand. Paragraph no.22 of the said decision reads as under:-

> **"22. As rightly pointed out by learned counsel for the assessee there is not even a token mention of the draft orders having been perused by the Additional Commissioner of Income-tax. The letter simply grants an approval. In other words, even the bare minimum requirement of the approving authority having to indicate what the thought process involved was is missing in the aforementioned approval order. While elaborate reasons need not be given, there has to be some indication that the approving authority has examined the draft orders and finds that it meets the requirement of the law.** As explained in the above cases, the mere repeating of the words of the statute, or mere "rubber stamping" of the letter seeking sanction by using similar words like "seen" or "approved" will not satisfy the requirement of the law. This is where the Technical Manual of Office Procedure becomes important. Although, it was in the context of section 158BG of the Act, it would equally apply to section 153D of the Act. There are three or four requirements that are mandated therein, (i) the Assessing Officer should submit the draft assessment order "well in time". Here it was submitted just two days prior to the deadline thereby putting the approving authority under great pressure and not giving him sufficient time to apply his mind ; (ii) the final approval must be in writing ; (iii) the fact that approval has been obtained, should be mentioned in the body of the assessment order."
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> [Emphasis supplied]

14. During the course of arguments, learned counsel for the assessee apprised this Court that the Special Leave Petition preferred by the Revenue against the decision in the case of Serajuddin (supra), came to be dismissed by the Supreme Court vide order dated 28.11.2023 in SLP (C) Diary no. 44989/2023.

15. A similar view was taken by this Court in the case of Anuj Bansal (supra), whereby, it was reiterated that the exercise of

powers under Section 153D cannot be done mechanically. **<u>Thus, the salient aspect which emerges from the abovementioned decisions is that grant of approval under Section 153D of the Act cannot be merely a ritualistic formality or rubber stamping by the authority, rather it must reflect an appropriate application of mind.”</u>**

[Emphasis supplied]

12. A perusal of the discussion extracted hereinabove would lead us to safely conclude that after placing reliance on various judicial pronouncements, this Court was of the opinion that approval under Section 153D cannot be accorded in a casual or mechanical manner. Rather, the said exercise involves due application of mind which must be reflected in the order of approval passed by the concerned statutory authority.

13. In the instant case, with respect to the inappropriate approval accorded by the relevant authority, the ITAT has made a categorical finding, which reads as under: -

> “36. A perusal of the approval sought by the Assessing Officer shows that he has requested to grant necessary approval u/s 153D for the cases completed u/s 153A/143(3) of the Act. **<u>A combined perusal of the approval sought by the Assessing Officer, the approval given by the Addl. CIT and the copy of remand report of the Assessing Officer show that there is only some namesake approval given by the Addl. CIT on the very same day on which the Assessing Officer sought approval. The Addl. CIT without verifying the records has given approval in a mechanical manner. This is more so evident from the fact that the opening balance of unsecured loans of Rs.8 Crores was added by the Assessing Officer, which is not a small amount and the number of unsecured loan creditors are only four and not very large. We find merit in the argument of the ld. Counsel for the assessee that the Ld. Addl. CIT received draft assessment order in 35 cases and approved all cases in one go on the same day</u>** and the Assessing Officer not only passed the orders on the very same day but also prepared demand notices after completion of tax calculation and penalty notices etc. which is not possible within a span of few hours.”
>
> 37. ---

However, in the present case, we have no hesitation in stating that there is complete non-application of mind by the Ld. CIT before granting the approval. Had there been application of mind, he would not have approved the addition of Rs. 8 Crores in respect of M/s Tirupati Real Tech Pvt. Ltd. and Rs. 7 1akhs in respect of M/s Golden Buildmart PvL Ltd. which are opening balances and the very same amounts were added in the preceding Assessment Year. Even the Assessing Officer in his remand report has also admitted the mistake that the addition of an amount of Rs. 8 Crores, was the opening balance and the mistake is apparent from record and needs to be rectified."

[Emphasis supplied]

14. It is, therefore, discernible from the impugned order of the ITAT which reckons a categorical finding, and rightly so, that the approval under Section 153D of the Act has been granted without due application of mind in the present case. Admittedly, the ITAT notes that the Additional CIT has approved the draft assessment order without verifying the record which was made available before the said authority. It is further seen that the approval in the present case was accorded on the same day when it was sent to the concerned authority. It is also noteworthy that 35 draft assessment orders were approved by the Additional CIT in one go on the said day.

15. Thus, in light of the decision rendered by us in *Shiv Kumar Nayyar (supra),* it is seen that the present appeals do not raise any substantial question of law. Consequently, the appeals stand dismissed and pending application(s), if any, are disposed of.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MAY 17, 2024/p